



Montana
Office of Public Instruction
Denise Juneau, State Superintendent

opi.mt.gov

Office of Public Instruction
P.O. Box 202501
Helena, MT, 59620-2501
(406) 444-3095
(888) 231-9393
(406) 444-0169 (TTY)
opi.mt.gov

September 1, 2016

(Complainant's attorney)

(District's attorney)

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT for In the Matter of *** Case #2016-05, Alleged Violations of the Individuals with Disabilities Education Act (IDEA).**

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. Through her attorney, ** (Complainant) filed the Complaint on behalf of her child, *** (Student), a student in *** Public School District (District). Complainants allege the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq.

Complainant alleges the District failed to provide Student a free appropriate public education (FAPE) throughout the 2015-2016 school year.

A. Procedural History

1. On May 11, 2016, the Office of Public Instruction (OPI) received the special education complaint.
2. The parties agreed to extend the time period for this state complaint by extending the Early Assistance Program process to July 20, 2016 to attempt to informally resolve the issues in the Complaint pursuant to 34 CFR 300.152(b)(ii). On July 14, 2016 OPI's Early Assistance Program Director received an email from Complainant's attorney stating the Complainant would like to proceed with the investigation.

B. Legal Framework

The OPI is authorized to address alleged violations of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §300.151-153 and ARM 10.16.3662, which occurred within one year prior to the date of the complaint. Pursuant to 34 CFR § 300.151-153 and ARM 10.16.3662, all relevant

information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation or rule occurred.

C. Findings of Fact

1. Complainant has standing to file this Complaint pursuant to ARM 10.16.3661 and 34 CFR § 300.153.
2. Student was 14 years old and supposed to be in the eighth grade at the time the complaint was filed.
3. Student did not receive any special education and related services during the look back period of this state complaint from May 11, 2015 through May 11, 2016.
4. Review of Student's IEPs since 2012 indicate Student's behavior impedes the learning of himself or others. Notes in Student's March 13, 2104 IEP states behavior is a major roadblock to learning. Behaviors include throwing things, violence (kicks, hits, and scratches), refusal and behaving in oppositional and defiant ways. The notes also indicate behaviors have improved over the years, such as not locking doors and transitioning between rooms. Improvement in sight word reading was also noted. Behaviors were said to improve due to consistency in instructions, instructions using clear directives, step-by-step directives, and setting up the proper environment to eliminate triggers for an inappropriate response. "Improvements have come slowly, over years, and only with consistent actions from those around him."
5. Student had evaluations conducted by the Montana Autism Project in September of 2013 and 2014. Both recommended a Functional Behavior Assessment (FBA) and behavior plan.
6. The last IEP to which Complainant consented is dated March 3, 2014.
7. A neuropsychological evaluation was conducted with a report dated August 26, 2014. Diagnostic impressions included: Intellectual Disability, Moderate to Severe; Oppositional Defiant Disorder, Language Disorder, Speech Sound Disorder, Sensory Processing Disorder, Traumatic Brain Injury; and Hemineglect of Right Side. In the report, the evaluator advised Student's mother to get further testing to rule out Genetic or Metabolic Disorder.
8. The most recent evaluation report for Student is dated September 4, 2014. The evaluation report was not signed by any participants. This included an FBA and behavior program.
9. An IEP meeting was held on October 28, 2014, but Complainant did not consent to the IEP. In the notes of the IEP a behavioral plan was developed. This was the only behavioral plan provided by the District.
10. Student kicked the special education teacher on October 29, 2014 and was reported to law enforcement. Student was charged with misdemeanor assault, and the District obtained a restraining order prohibiting Student from entering school grounds.
11. Student's placement was changed at some point in the fall of 2014, from the school to homebound services provided at a nearby church. This change in placement is not noted in any IEP. Student did not receive any education services after October 2014. This is beyond the look back period of this Complaint but is included to demonstrate how long it has been since District has provided educational services to Student.

12. On February 6, 2015 Student was found to lack fitness to proceed in the criminal case and was ordered to be committed to Montana Department for Public Health and Human Services (DPHHS) until he was fit to proceed or the matter was otherwise disposed of.
13. The DPHHS Developmental Disabilities Program, Crisis Prevention and Response Team did provide a Behavior Assessment Report and Intervention Plan (DDP-BIP) dated February 19, 2015. As a result of the DDP-BIP the judge dismissed the case by stipulation for lack of fitness to proceed.
14. Student's last proposed IEP is dated October 12, 2015. Complainant did not consent to this IEP. The proposed IEP does not contain any information regarding Student's placement and does not specify any minutes of special education or related services. The box where the minutes are typically designated on the IEP form is completely missing.
15. The District advertised for a part time special education teacher and two special education para educators on the Montana Jobs for Teachers website on October 9, 2015 and February 23, 2016. The job posting expires 90 days after it is posted.¹
16. The District did not receive any responses from the job postings.
17. The District attempted to contact a man in Billings that the Complainant thought might be able to work with Student. The District wrote two letters dated December 17, 2015 and February 23, 2016 asking him to contact the Superintendent to schedule an interview for a part-time paraprofessional position with the district.
18. The Superintendent made contact with 56 other districts in Montana via phone or email:
 - 25 schools followed up with a letter indicating they would not be able to enroll Student;
 - 25 schools did not follow up after the initial contact with the Superintendent via phone or email; and
 - 6 schools followed up by responding they need more information prior to making a determination. There is no documentation of any follow up to these requests for more information.
19. The Superintendent contacted one private non-profit corporation and inquired about placement in their group home program. Admission was denied.

Analysis and Conclusions

Issue: Did the District deny Student a free appropriate public education (FAPE) during the 2015-2016 school year?

The District has a responsibility to determine which students require special education and the type of special education needed, this determination must be made in compliance with the IDEA and implementing state laws and regulations. MCA § 20-7-414(1). Pursuant to ARM 10.16.3122 the local educational agency in which a student resides is responsible for ensuring the student with disabilities, age 3 through 18, beginning on the student's third birthday, including students with disabilities who have been suspended or expelled from school, has available a

¹ It is noted after the time this Complaint was filed, the District has again posted position vacancies on the Montana Jobs for Teachers website on July 14, 2016 and August 3, 2016.

FAPE in accordance with the IDEA and its implementing regulations. FAPE means special education and related services that:

- (a) are provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the state educational agency;
- (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) are provided in conformity with an individualized education program (IEP).

34 CFR §300.17.

The proper standard to determine whether a student with a disability has received FAPE is the “educational benefit” standard. *J.L. v. Mercer Island School Dist.*, 592 F.3d 938,951 (9th Cir. 2010). The district must confer at least “some educational benefit” on students with disabilities. *Id.* This standard is referred to as “a basic floor opportunity” not a “potentially maximizing education.” *Id.* at 947 citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 197 (1982). The District admits not providing any education services for Student during the 2015-2016 school year. **The District denied Student a FAPE for the 2015-2016 school year.**

The District alleges, however, the reason it did not provide educational services to student is because it does not have qualified providers to provide services to Student and has been unable to otherwise secure services for Student. The District alleges they are continuously advertising for special education and paraprofessionals but have been unsuccessful in hiring qualified candidates. Districts must take measurable steps to recruit, hire, train and retain qualified personnel including individuals with disabilities, to provide special education and related services to students with disabilities. ARM 10.16.3122(8). The challenges of the District, which is a very small rural school, in recruiting a special education teacher and a paraprofessional are noted.² However, the District did not take adequate steps to recruit qualified personnel to provide special education and related services. The District posted on one website and tried to make contact with one person who Complainant thought might be interested in a position to work with Student.

The District also alleges they have contacted approximately 56 other school districts and a private non-profit residential group home and none of them accepted Student.³ Pursuant to MCA § 20-7-421 the District may arrange attendance of a child in need of special education and related services in another district within the state of Montana. The District appears to have contacted many schools to see if they could arrange an out-of-district placement. Many of the schools were beyond a distance where Student would be able to commute home on a daily basis, or the districts contacted were even smaller than the District.

² The District’s 2015-16 K-12 enrollment was 36 students.

³ Some of the Districts requested more information, or suggested the District check back at other times during the school year. No documentation of follow up was provided by the District.

Student has been out of school, receiving no education services since approximately November 2014. The documentation produced demonstrated Student has had a history of significant behavioral concerns. The District reports they have lost many staff members due to this Student's behavior. There is an indication in the notes to the Student's 2012 IEP that Student's behaviors may have improved in some areas but he was still struggling. The District, however, did not obtain a functional behavioral assessment until early September 2014. The District then attempted to write a behavioral intervention plan, but not until the IEP meeting on October 28, 2014. That plan was not in place for even a full day when the District called law enforcement on October 29, 2014 to report Student had kicked a teacher.⁴

The District has not had any significant contact with Student since early fall of 2014. The District does not have current information as to where student is performing academically or behaviorally. In the District's Response dated May 17, 2016, the District indicates a willingness to pay for student to be placed in a residential treatment facility. Complainant's Reply to the District's Response disagrees that residential placement is necessary. The last proposed IEP dated October 12, 2015, does not contain any information regarding a specific placement for student and does not specify any minutes of special education or related services. The box on the IEP form is completely missing. Additionally, there is nothing on the IEP that indicates the District is proposing homebound services or a shortened school day. Steps to determine Student's appropriate placement need to be taken immediately.

Therefore, the required corrective actions are as follows:

1. The District shall conduct a comprehensive reevaluation of Student. The District shall prepare an evaluation plan for Complainant's review by **September 16, 2016**. A copy of the evaluation plan shall be sent to OPI.
2. After Complainant consents to the evaluation plan, the District has **30 days** to conduct the comprehensive reevaluation. The Evaluation Report Team shall meet within **two weeks** of the completion of the reevaluation. A copy of the evaluation report shall be sent to OPI.
3. The IEP team shall meet within **two weeks** of the evaluation report team meeting to discuss the evaluation report, including appropriate placement options for student, and incorporate the discussion into the IEP as necessary. A copy of the IEP shall be sent to OPI.
4. The District owes Student compensatory education for denial of a FAPE for one entire school year. The IEP team shall discuss what compensatory education would make up for Student's missing an entire school year and draft a plan for those educational and related services. The compensatory education must be above and beyond what services are determined appropriate for Student this next school year. The plan must be reviewed and approved by OPI prior to implementation.

⁴ Student's proposed behavior plan on the October 28, 2014 IEP states, "If [Student] commits physical violence against a student of staff member, law enforcement will be called." This is most likely based off the recommendation of the evaluator for Student's September 2014 report of psychological, social emotional, behavioral and functional evaluation results, which recommended where someone is hurt to contact law enforcement. With the hope that if it is reported, there is a record to allow other agencies to help student.

5. The District must take **immediate steps** to hire a special education teacher and a paraprofessional: The District must post for the positions in several places and at a national level by **September 16, 2016**.⁵ Copies of all postings and subsequent inquiries or interviews must be reported to OPI.

6. The District must begin providing educational services for Student as soon as possible but no later than **October 30, 2016**. For any school days that are missed during August, September or October 2016, the District must offer compensatory education to Complainant.

Systematic Concern

Because the District does not have a special education teacher to provide special education services to students who have IEPs, there is a systematic concern that none of the Students on IEPs are receiving the special education and related services indicated on their IEPs.

Therefore, **by September 16, 2016**, the District shall provide to the OPI a list of all other students on IEPs in the District and the IEPs for these students. Parental contact information for the students must also be provided. The OPI will investigate the potential denial of FAPE for these students. The District shall cooperate with the investigation and take any action ordered by the OPI upon completion of the investigation including an offer of compensatory services for identified deprivations.

Ann Gilkey, Chief Legal Counsel

c: Mandi Gibbs, Dispute Resolution/EAP Director
Frank Podobnik, State Special Education Director
Dale Kimmet, School Improvement/Compliance Unit Manager

⁵ The District may want to look into the Montana Council of Administrators of Special Education's (MCASE) recruitment project which recruits highly qualified special education personnel at the state, regional and national level. <http://www.sammmt.org/Page/433>